Filed 3/17/09 P. v. Williams CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JARAMI DANYELL WILLIAMS, Defendant and Appellant.	G040347 (Super. Ct. No. RIF131740) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Elisabeth Sichel, Judge. Affirmed in part, reversed in part, and remanded.

Terrence Verson Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jarami Danyell Williams challenges his convictions for robbery, burglary, and receiving stolen property. He contends the court wrongly failed to hold a second competency hearing and instruct the jury on the lesser included offense of attempted robbery. He also contends insufficient evidence supports his receiving stolen property conviction. We disagree with each contention, and affirm the judgment of conviction. But the court wrongly imposed a consecutive term for a firearm enhancement while imposing a concurrent term for the underlying felony. We reverse the sentence and remand for resentencing.

FACTS

The Robberies

Defendant entered a department store on July 15, 2006. He filled his shopping basket with electronic devices, including four Motorola and four T-Mobile cellular phones. He then placed the devices in a garbage bag and left the store. Two store security guards, Richardson and Camarena, were waiting for him outside. As they followed him, defendant dropped one of the cellular phones, pulled out a handgun, and pointed it at the security guards. Keeping the gun trained on the security guards, defendant got in his car and drove off.

Defendant entered another department store on July 21, 2006. He grabbed two DVD players and started to leave the store. A store security guard by the exit asked defendant to show his receipt; defendant replied he was not given one, and walked out of the store. Another security guard confronted defendant and asked him to come back inside. Defendant stated he had a gun. The second security guard told defendant to take the DVD players and leave, which he did.

Defendant went back to the first department store on July 31, 2006. He took MP3 player docking stations and compact discs, and left through a fire exit.

Defendant went back to the second department store on August 2, 2006, stealing some electronic devices. When defendant returned to the store later that day, store employees wrote down the license plate number of the car he was driving and called the police. The police located and arrested defendant. They also contacted the car's owner, who had loaned the car to defendant. The owner told the police defendant had stayed with her and left some items at her house. The police found five prepaid cellular phones still in their packaging with defendant's belongings. In a police interview, defendant admitted stealing the cellular phones from the department store sometime earlier.

Defendant's Competency

Before trial, the court declared doubt as to defendant's competency to stand trial. (See Pen. Code, § 1368.)[1] After considering reports from two court-appointed psychiatrists, the court found defendant competent.

During the trial, defense counsel mentioned defendant's need for antidepressant and psychotropic medication. The court stated, "I was concerned about [defendant's] affect the last couple days. He seemed very depressed. So I'm glad you told me that. I don't know what I can do other than make the order. I'm going to order that he be given his psychotropic medication every day including trial days." Defense counsel stated defendant "has been helping me and participating, but he has been clearly depressed, which sometimes people are in trial. And I didn't make that connection until right now when he said he wasn't on his meds, why he's been so different on his trial days."

The court clarified, "I have been concerned about [defendant's] affect from the standpoint — not the standpoint of being incompetent to stand trial. I do want to

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[1] All further statutory references are to the Penal Code.

make that clear. Clearly, he has been able to understand the nature of the proceedings. He's been able to participate in them and had been, in fact. My concern was that he seemed to be getting more depressed, and it didn't seem like that was the normal Mr. Williams. So I chalked it up to just the fact that we're in trial listening to testimony. It's getting serious at the point and real for him, but he didn't strike me as being so far out of the loop that he can't participate meaningfully. He's clearly tracking what's going on." Defense counsel replied, "I'm going to agree with the Court as far as competency. There's no issue on that. And yes, he has been helping me. But now I'm wondering would he be assisting me more."

The prosecutor reminded the court that defendant "was [given a section] 1368[] [hearing] at one point during the proceedings by his attorney, and he was evaluated by three physicians all of which found him to be competent." The court stated, "Yes. If I had any hesitance about his competency, then I know . . . we'd be having a hearing." It continued, "There's a lot of places short of competency that still has an impact upon someone's ability to function. That's what it means to have a mental illness. It wouldn't be deemed an illness if it didn't have an impact on your ability to function." The court issued an order providing, "ATTENTION JAIL [¶] Court orders defendant to be given his medications daily while he is in trial and everyday after trial." Trial resumed.

The Verdict and Sentence

The jury found defendant guilty of three counts of robbery arising from the July 15 and July 21 incidents (§ 211), one count of burglary arising from the July 31 incident (§ 459), and one count of receiving stolen property (§ 496) arising from the five prepaid cellular telephones. It found true allegations that he personally used a firearm in connection with two of the robberies. (§§ 12022.53, subd. (b), 1192.7, subd. (c)(8).)

The court sentenced defendant to a total term of 15 years, four months in state prison. It imposed a two-year low term for the robbery charged in count 1 (the Richardson robbery), plus a consecutive 10-year term for the related firearm enhancement. It imposed concurrent terms for the remaining counts. But the court imposed a consecutive term of 3 years, four months (one-third of the 10-year term) for the firearm enhancement related to the robbery charged in count 2 (the Camarena robbery).

DISCUSSION

The Court Was Not Required to Conduct a Second Competency Hearing

Defendant contends the court should have made further inquiry into his competency when defense counsel raised the issue of his medication. He notes even the court wondered about his "depressed" "affect."

To be sure, "[a] defendant who is mentally incompetent cannot be tried or adjudged to punishment. [Citations.] A defendant is mentally incompetent to stand trial if, as a result of mental disorder or developmental disability, the defendant is 'unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.'" (*People v. Marshall* (1997) 15 Cal.4th 1, 31 (*Marshall*).)

But the court had already found defendant competent. "When, as here, a competency hearing has already been held and the defendant was found to be competent to stand trial, a trial court is not required to conduct a second competency hearing unless 'it "is presented with a substantial change of circumstances or with new evidence"' that gives rise to a 'serious doubt' about the validity of the competency finding." (*Marshall*, *supra*, 15 Cal.4th at p. 33.)

The evidence supporting a second competency hearing must itself be substantial. (*People v. Frye* (1998) 18 Cal.4th 894, 1004, disapproved on a different

point by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) It may consist of "a sworn statement of a mental health professional that defendant was incapable of understanding the purpose and nature of the proceedings." (*People v. Gallego* (1990) 52 Cal.3d 115, 162 (*Gallego*).) Also, "when . . . a competency hearing has already been held, the trial court may appropriately take its personal observations into account in determining whether there has been some significant change in the defendant's mental state. This is particularly true when, as here, the defendant has actively participated in the trial." (*People v. Jones* (1991) 53 Cal.3d 1115, 1153 (*Jones*).)

We review the decision whether to conduct a second competency hearing for an abuse of discretion. (*Marshall, supra,* 15 Cal.4th at p. 33.) "'"An appellate court is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper."'" (*Ibid*.)

The court did not abuse its discretion by declining to hold another competency hearing. No substantial evidence shows any "substantial change of circumstances" regarding defendant's competency. (*Marshall, supra,* 15 Cal.4th at p. 33.) No mental health professional opined defendant could not understand the nature of the proceeding or assist defense counsel. (See *Gallego, supra,* 52 Cal.3d at p. 162.) Nor did the court's "personal observations" so suggest. (*Jones, supra,* 53 Cal.3d at p. 1153.) To the contrary, the court observed defendant "[c]learly . . . has been able to understand the nature of the proceedings," has "been able to participate in them[,] and has been [participating], in fact." Defense counsel did not doubt defendant's competency, either; he "agree[d] with the Court as far as competency. There's no issue on that." Defense counsel noted defendant "has been helping [him]" prepare for trial. While defendant's mood suffered due to an inconsistent medication schedule, and defense counsel wondered whether regular medication would help defendant "assist[] [him] more," defendant's glumness raised no "'serious doubt'" about his competency. (*Marshall, supra,* 15 Cal.4th

at p. 33.) Moreover, the court promptly ordered the jail to provide defendant's medication to him every day. Nothing more was required. Defendant's "depressed" "affect" did not mandate another competency hearing.

The Court Properly Refused to Instruct on Attempted Robbery

Defendant contends the court should have instructed the jury sua sponte on attempted robbery as a lesser included offense to robbery, as charged in counts 1 and 2 (the June 15, 2006 robberies of Richardson and Camarena). He asserts he did not accomplish the robberies through force or fear (§ 211), but not for lack of trying. He notes one of the store security guards, Camarena, testified that the other, Richardson, had told her to let defendant leave the store without confronting him — Richardson said they would just try to write down his license plate number. Defendant concludes no force or fear was required to accomplish the robberies, but because he tried to use force or fear, the evidence supported an attempted robbery instruction.

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) A robbery continues until "'the loot [has been] carried away to a place of temporary safety.'" (*People v. Gomez* (2008) 43 Cal.4th 249, 256 (*Gomez*).) Thus, "robbery can be accomplished even if the property was peacefully or duplicitously acquired, if force or fear was used to carry it away." (*Ibid*.) Actual fear may be inferred from circumstances reasonably calculated to produce fear, without direct testimony of the victim's state of mind. (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1709, fn. 2. (*Mungia*); *People v. Cuevas* (2001) 89 Cal.App.4th 689, 698.)

Attempted robbery is a lesser included offense of robbery. "An attempted robbery requires a specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission." (*People v. Medina* (2007) 41 Cal.4th 685, 694; see generally § 21a [attempt defined].)

"A trial court must instruct on a lesser included offense if substantial evidence exists indicating that the defendant is guilty only of the lesser offense. [Citation.] '"Substantial evidence" in this context is "'evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]'" that the lesser offense, but not the greater, was committed.'" "[O]n appeal we employ a de novo standard of review and independently determine whether an instruction on the lesser included offense . . . should have been given." (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

Defendant's attempted robbery theory is strained, at best. He contends his effort to take the stolen goods through force or fear was ineffectual because the security guards were going to let him leave anyway; the robbery was not "accomplished by means of force or fear." (§ 211.) Yet the existing jury instructions accounted for this possibility, albeit not under defendant's erroneous theory of attempted robbery. The court instructed the jury on the elements of robbery, including the element that the taking must be actually accomplished by force or fear. (CALCRIM No. 1600.) It also instructed the jury on the elements of the lesser included offense of grand theft, which omits the force or fear requirement. (CALCRIM No. 1800.) Defendant's attempt to use force or fear to accomplish a successful taking of the goods, cannot be isolated from its result; his attempt to instill fear was either successful or it was not. If it was successful, then defendant accomplished the taking through force or fear, and he was guilty of robbery. If it was unsuccessful, then defendant took the goods without the actual of use force or fear, and he was guilty of grand theft. No instructions on any other offense were required to account for an unsuccessful attempt to use force or fear.

Moreover, no substantial evidence supported an attempted robbery instruction. Camarena testified Richardson told her they were going to let defendant leave without confronting him. Yet she also testified that after she spoke to Richardson, they followed defendant to see his license plate, whereupon he pulled out the gun. Richardson similarly testified he let defendant walk past him and turn around the corner

of the building, then "made [his] approach" towards defendant, whereupon defendant pulled out the gun. The only reasonable inference is the security guards were attempting to write down defendant's license plate number when he pointed the gun at them outside the store. Thus, defendant used their actual fear to accomplish the taking while he was still carrying the stolen goods to a place of temporary safety. (See *Gomez, supra*, 43 Cal.4th at p. 256; see also *Mungia, supra*, 234 Cal.App.3d at p. 1709, fn. 2.) No substantial evidence suggests defendant's use of fear was ineffectual. Thus, an attempted robbery instruction was unnecessary.

Substantial Evidence Supports the Receiving Stolen Property Conviction

Defense counsel conceded in his opening statement and closing argument that defendant was guilty of receiving stolen property, the five prepaid cellular telephones. Police officers testified the cellular telephones were with defendant's belongings, and defendant confessed to stealing them from the department store. Yet on appeal, defendant contends insufficient evidence supports this conviction because the only evidence supporting it was his own confession.

Defendant invokes the corpus delicti rule. It "requires the prosecution to prove the corpus delicti — i.e., that a crime actually occurred — by evidence other than the defendant's own out-of-court statements." (*People v. Herrera* (2006) 136 Cal.App.4th 1191, 1200 (*Herrera*).) "[T]he rule reflects the . . . fear that confessions may be the result of either improper police activity or the mental instability of the accused, and the recognition that juries are likely to accept confessions uncritically." (*Jones v. Superior Court* (1979) 96 Cal.App.3d 390, 397.) The corpus delicti of receiving stolen property consists of the receipt of stolen property with the knowledge it is stolen. (*People v. Riccio* (1996) 42 Cal.App.4th 995, 1001 (*Riccio*).)

Accordingly, the prosecution must offer some additional evidence (beyond his confession) defendant received the stolen cellular telephones with the knowledge they

were stolen. "The amount of independent proof of a crime required for this purpose is quite small [and has been] described . . . as 'slight' [citation] or 'minimal.'" (*People v. Jones* (1998) 17 Cal.4th 279, 301.) "It is true the additional evidence need only be 'slight'; '[t]he independent proof may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible.'" (*Herrera*, *supra*, 136 Cal.App.4th at p. 1205.) "The inference need not be 'the only, or even the most compelling, one . . . [but need only be] a *reasonable* one . . . .'" (*Jones*, at pp. 301-302.) "[C]ases where the 'slight proof' required to establish a corpus delicti has been found wanting . . . are rare." (*Riccio*, *supra*, 42 Cal.App.4th at p. 1000.)

The prosecution offered adequate independent evidence supporting the receiving stolen property conviction. A total of *five* cellular telephones were found with defendant's belongings. They were still in their original packaging. They resembled cellular telephones available at the department stores, to which defendant had repeated access. These facts sufficiently constitute the slight evidence needed to show defendant knowingly received stolen property.[2]

The Matter Must Be Reversed and Remanded for Resentencing

The parties agree the court erred by imposing a consecutive term for the firearm enhancement related to the count 2 robbery, while imposing a concurrent term for the robbery itself. So do we.

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[2] Defendant alternatively contends he cannot be convicted of both receiving the stolen cellular telephones and robbing the department store to steal them. (See *People v. Recio* (2007) 156 Cal.App.4th 719, 723-724.) He correctly states the general principle, but cannot avail himself of it. No substantial evidence shows the *five* prepaid cellular telephones were the same as the *four* Motorola and *four* T-Mobile cellular telephones he robbed on June 15, 2006, although the cellular telephones may have been in a "similar type of packaging."

"Subordinate terms include only those terms for felony convictions which have been imposed consecutively. . . . Under the sentencing scheme an enhancement may not be imposed as a subordinate term on its own." (*People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1310.) "The personal gun-use enhancements to which [the defendant] admitted were not separate crimes and cannot stand alone. Each one is dependent upon and necessarily attached to its underlying felony. In separating the felony and its attendant enhancement by imposing a concurrent term for the felony conviction and a consecutive term for the enhancement the court fashioned [the defendant's] sentence in an unauthorized manner under the sentencing procedure. We must therefore remand for resentencing." (*Id*. at p. 1311; accord 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 283, pp. 373-374.) This analysis applies equally here.

DISPOSITION

The judgment of conviction is affirmed, the sentence is reversed, and the matter is remanded to the trial court for resentencing.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O'LEARY, J.